United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Chicago Trading Group, Inc.

Bankruptcy No. 97 B 19843

Adversary No. 99 A 410

Date of Issuance: January 17, 2001

Judge: Ginsberg

Appearance of Counsel:

Attorney for Trustee:	**Diana Kenney Langmar** **Bellows and Bellows** **79 W. Monoe, Suite 800** **Chicago, IL 60603**
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Trustee:	**Richard M. Fogel** **Hopkins & Sutter** **Three First National Plaza** **Suite 4100** **Chicago, IL 60602**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	**Chapter 7**
	)	
Chicago Trading Group, Inc.,	)	**Bankruptcy No. 97 B 19843**
	)	
Debtor.	)	**Hon. Robert E. Ginsberg**
---	)	
Richard Fogel, Trustee,	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 99 A 00410**
	)	
Spike Trading, L.L.C., Spike Trading	)	
Inc., an Illinois Corporation, and	)	
Spike International Holdings, Ltd.	)	
Defendants.	)	

Memorandum Opinion and Order

This matter is before the court on the motion of Spike Trading L.L.C. and Spike Trading, Inc. to dismiss the first amended complaint filed by Richard Fogel, the chapter 7 trustee for the estate of Chicago Trading Group, Inc., against Spike Trading, L.L.C., Spike Trading, Inc., an Illinois corporation, and Spike Holdings, Ltd., for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b). For the reasons stated in this opinion, the motion to dismiss the first amended complaint against STI is granted, and the motion to dismiss the first amended complaint against LLC is denied.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. §1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. The parties seem to regard the instant proceeding as noncore. They are proceeding on the

assumption that the consent of the parties is required for this Court to finally determine this adversary proceeding. This Court does not agree. Instead, this Court believes that the trustee's complaint seeks either turnover of property of the estate or an order affecting the liquidation of the assets of the estate, both of which would be core proceedings. 28 U.S.C. §§157(b)(2)(E) and (O). As such, this matter should be heard and determined by this Court as a core proceeding. See, e.g., Matter of Memorial Estates, Inc., 950 F.2d 1364, 1370 (7th Cir. 1992), The Home Insurance Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 748-49 (discussion of core and noncore proceedings).

Even if this Court is wrong in its analysis that this matter should be dealt with as a core proceeding by this Court, such a conclusion should not lead to further expenditures of the time of counsel and this Court. Therefore, this Court respectfully suggests to any reviewing court that in the event such court finds the matter to be a noncore proceeding, the reviewing court treat this Court's findings of fact and conclusions of law as proposed findings of fact and proposed conclusions of law and deal with them accordingly. See 28 U.S.C. §157(c)(1). See also Matter of Grabill Corp., 967 F.2d 1152, 1156 (7th Cir. 1992); Steinberg v. Kendig, 2000 WL 28266 at *8, n.2 (N.D. IL 2000).

Standards for Motion to Dismiss

To prevail on this motion to dismiss, the defendants must establish that the Trustee could prove no set of facts from the pleadings in support of his claim which would entitle him to relief. Conley v.

Gibson, 355 U.S. 41 (1957); Swanson v. Wabash, Inc., 577 F. Supp. 1308 (N.D. IL 1983). The issue is not whether the Trustee will ultimately prevail, but whether he has pled a theory of a cause of action sufficient to entitle him to offer evidence in support of his claim. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). For purposes of resolving a motion to dismiss, both the facts alleged in the complaint and reasonable inferences drawn from these facts are considered in the light most favorable to the plaintiff. Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732, 733 (7th Cir.1986), cert. denied 482 U.S. 915, 107 S. Ct. 3188, 96 L. Ed.2d 676 (1987).

Facts

The Debtor was engaged in the commodities brokerage business and was registered with the National Futures Association as a Guaranteed Introducing Broker.[1] Between April 17, 1995 and June 13, 1997, the Debtor was a Guaranteed Introducing Broker for Peregrine Financial Group, Inc. ("PFG"). PFG is one of the Debtor's creditors. Timothy Mouton is the sole shareholder and officer of the Debtor.

On June 25, 1997, the Debtor became a Guaranteed Introducing Broker of Spike Trading, L.L.C. ("LLC").[2] Pursuant to the terms of the "Fully Disclosed Clearing Agreement" ("Clearing Agreement") signed by the Debtor and LLC, LLC agreed to provide the Debtor with clearing,

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[1] A Guaranteed Introducing Broker ("GIB") is a broker whose operations are guaranteed by a Futures Commission Merchant. A GIB has no minimum capital or financial reporting requirements, and all the GIB's accounts must be carried by the guaranteeing Futures Commission Merchant. A Futures Commission Merchant must be registered with the Commodity Futures Trading Commission, and is an individual or organization that solicits or accepts orders to buy or sell futures or options contracts and accepts money or other assets from customers for such orders. National Futures Association, Glossary, http://www.nfa.futures.org/basic/glossary.asp? (last visited Nov. 14, 2000).

[2] A Limited Liability Company ("L.L.C.") is an entity which has the tax advantages of a general partnership, but with corporate limited liability to protect its members. Todd N. Sheldon & Steven G. Frost, Illinois Limited Liability Companies, OAIB IL-CLE 4-1 (May, 1999).

execution and other services related to the purchase and sale of commodities futures. Under the terms of the Clearing Agreement, and in accordance with industry standards and the parties' practices, LLC was to pay the Debtor commissions and was to retain a portion of the funds generated by the trading activity in the Debtor's customer's accounts.

During the course of their relationship, the Debtor became indebted to PFG. Between June 13, 1997 and June 20, 1997, PFG's General Counsel, Rebecca Wing, and PFG's Director of Compliance, Susan Rooks, met with Timothy Mouton to discuss how the Debtor would repay its debt to PFG. During these discussions, it was agreed that the Debtor would pay off the debt by assigning the commissions due to it from LLC to PFG.

In anticipation of the assignment of commissions from the Debtor to PFG, Wing and Rooks had several discussions with LLC's principals and Kelly Dickenson, LLC's director of compliance, regarding the situation between PFG and the Debtor. At a June 17, 1997 meeting, Wing explained that the Debtor was indebted to PFG. To reduce the debt, the commissions generated by the Debtor through LLC would be paid to PFG. An unnamed representative of LLC agreed not to transfer commissions earned by the Debtor into Mouton's name but to pay those commissions only to the Debtor.

On June 27, 1997, an involuntary chapter 7 petition was filed against the Debtor. PFG was one of the petitioning creditors. An order for relief was entered on January 21, 1998. On January 22, 1998, the United States Trustee appointed Richard Fogel as the Debtor's chapter 7 trustee.

In a follow up conversation after the June 27 meeting concerning the assignment of commissions, Wing told an unnamed representative of LLC that PFG had filed an involuntary chapter 7 petition against the Debtor. A representative of LLC once again confirmed with Wing that commissions generated by the Debtor would be paid only to the Debtor, and would not be paid to Mouton. Despite its assurances to PFG, on July 2, 1997, the Debtor's next commission check in the amount of $5,000.00 was made payable to Mouton.

On July 15, 1997, Wing and Rooks had a telephone conference with a representative of LLC, who confirmed that the Debtor had earned the commissions in question and that the commissions would be paid only to the Debtor. Wing requested that someone at PFG hold the Debtor's commissions until they were paid over to the Debtor's Chapter 7 Trustee, because she planned to wait until a trustee was appointed in the Debtor's chapter 7 case before doing anything else. On July 16, 1997, more commissions earned by the Debtor, in the amount of $5,400.00, were paid to Mouton.

On July 22, 1997, an "Emergency Motion to Sequester and Escrow Funds and for a Hearing Instanter" was filed in this court by PFG. This court denied the motion as premature because PFG offered no evidence that the Debtor had dissipated the estate's assets. When the motion was presented, nobody from PFG knew that LLC had paid any of the Debtor's commissions to Mouton.

Between July 31, 1997 and September 1997, $41,754.03 was transferred by LLC to Mouton for commissions earned by the Debtor. Mouton did not remit any of the commissions to the Debtor.

LLC was dissolved on January 28, 1999. Spike Trading, Inc., ("STI") was a member of LLC and received distributions from LLC in connection with the winding up and liquidation of LLC's business. Spike International Holdings, Inc. ("Holdings") also was a member of LLC and also received distributions from the liquidation and winding up of LLC 's business.

On March 30, 1999, the Trustee filed the instant adversary proceeding against LLC, Holdings, and STI, alleging that LLC cooperated in the diversion of the Debtor's assets when it

made the commission payments to Mouton rather than to the Debtor. The Trustee claims that Holdings and STI are liable because LLC's assets were distributed to STI and Holdings during the dissolution of LLC. The Trustee seeks to recover damages equal to the amount of commissions that should have been paid to the Debtor, as well as prejudgment interest. On June 23, 1999, the Trustee filed an Amended Adversary Complaint, which differed from the original Complaint by discussing LLC, STI and Holdings separately, rather than referring to them as "defendant" only.

STI and LLC have moved to dismiss the First Amended Adversary Complaint ("Complaint"). That motion has been fully briefed and is now before the court for determination.

Discussion

STI contends that the Complaint against it should be dismissed for failure to state a claim upon which relief can be granted, because the Complaint does not contain any allegations of misconduct by anyone from STI. It is true that the Trustee does not allege any misconduct on the part of STI that would result in STI being liable to the Trustee. Rather, the Trustee joined the members of LLC, including STI, as parties to the Complaint. He did so because, if a judgment is entered against LLC, collection would necessarily involve members of LLC to the extent of their respective distributions.

The Trustee and STI agree that under Illinois law, 805 ILCS 180/10-10(a), a member of a limited liability company is liable for any obligation of the limited liability company, if a corporate shareholder would be liable for that obligation. 805 ILCS 180/10-10(a). The parties further agree that under Illinois law, owners who receive assets of a dissolved LLC can be liable

for the dissolved LLC's debts to the extent of any improper distributions they received. (Response p. 4-5, Reply p. 7).

At the outset, not surprisingly, the parties disagree on the procedure the Trustee must follow in enforcing the estate's rights against STI on account of the LLC assets STI received during the dissolution of LLC. The Trustee takes the position that he has a direct cause of action against STI resulting from the distributions STI received in violation of the absolute priority rule during the dissolution of LLC. The absolute priority rule requires that in the liquidation of an insolvent entity, creditors must be paid in full before owners can receive anything on account of their ownership interests. Bank of America Nat'l Trust & Savings Assn. v. 203 North LaSalle Street Partnership, 526 U.S. 434, 441-42, 119 S.Ct. 1411, 1416 (1999), Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 441, 88 S. Ct. 1157, 1172, 20 L.Ed.2d 1 (1968); In re Pullman Const. Industries, Inc., 107 B.R. 909, 945 (Bankr. N.D. IL 1990). See also Elizabeth Warren, 1991 Ann. Surv. Am. L. 9. STI's position is that it has no direct obligation to the Trustee on account of distributions received in the LLC dissolution. Instead, according to STI, the Trustee can only recover against STI by, in effect, garnishing the claim LLC has against STI on account of the improper distribution STI received in the LLC dissolution. This would require the Trustee to first obtain a judgment against LLC and then pursue supplementary proceedings to enforce the judgment against the claim LLC has against STI. (Reply p. 7-8).

The parties correctly agree that but for STI's receipt of LLC assets during the dissolution of LLC, STI would not be liable to the Trustee. Essentially, the Trustee is looking to STI as a source of funds for paying any judgment the court might enter against LLC. Federal Rule of

Bankruptcy Procedure 7069 governs the collection of judgments and provides in relevant part, "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held. . . ." Fed. R. Bankr. P. 7069. Thus, the question of whether the Trustee can proceed against STI to collect a judgment against LLC in the original suit is governed by Illinois law.

Part 14 of the Illinois Code of Civil Procedure deals with post-judgment matters. It is in this section that the guidelines for supplementary proceedings are found at 735 ILCS 5/2-1402. Supplementary proceedings are designed to permit a judgment creditor to locate assets of the judgment debtor that might be in the hands of a third party, and then to collect its judgment from nonexempt assets of the debtor that are in the hands of any third party, regardless of whether the third party defendant was a party to or otherwise in any way involved in the litigation which gave rise to the judgment. Mid-American Elevator Co., Inc. v. Norcon, Inc., 679 N.E.2d 387 (IL App. Ct. 1996); Bloink v. Olson, 638 N.E.2d 406, 408 (IL App. Ct. 1994). 735 ILCS 5/2-1402(a) provides:

> A judgment creditor . . . is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment . . . and of compelling the application of nonexempt assets or income discovered toward the payment of the amount due under the judgment.

735 ILCS 5/2-1402(a).

By definition, supplementary proceedings can be pursued only after a judgment has been entered against a defendant to a lawsuit. Absent a judgment, there is no judgment creditor to pursue the supplementary proceedings or judgment debtor to defend against such supplementary proceedings; the statute confers rights of prosecution and defense of supplementary proceedings only on judgment creditors and judgment debtors, respectively. See Ericksen v. Rush Presbyterian St. Luke's Medical Center, 682 N.E. 2d 79, 84 (IL App. Ct. 1997).[3]

There is no reason to jiggle with the plain meaning of the statute in this context, as the case law is clear that the plain meaning of the Illinois statute controls. 735 ILCS 5/2-1402(a). See e.g. Ericksen, 682 N.E. 2d at 84, Bank of Matteson v. Brown, 669 N.E.. 2d 1351, 1353 (IL App. Ct. 1996).

Illinois state courts, in general, agree with the majority view, and hold that supplementary proceedings can be initiated in Illinois only after a judgment has been entered. Ericksen, 682 N.E. 2d at 84, Bank of Matteson, 669 N.E. 2d at 1353 (because default judgment was not entered against all defendants, and there was no special finding regarding enforceability as required by the Illinois Supreme Court Rule 304,[4] the judgment was not enforceable and supplementary proceedings were improper). See also Dominick's Finer Foods, Inc. v. Makula, 217 B.R. 550 (Bankr. N.D. IL 1997)(citation to

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[3] Of course, a trustee in bankruptcy has all the rights of a judgment creditor under applicable nonbankruptcy law. 11 U.S.C. § 544(a).

[4] The relevant paragraph (a) of Illinois Supreme Court Rule 304 provides as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.

discover assets was not enforceable because enforcement of judgment in underlying suit was stayed because of pending motions to vacate and reconsider).

However, in E.E.O.C. v. JRG Fox Valley, Inc., 976 F.Supp. 1161 (N.D. IL 1997), the court found that the shareholders of a defunct corporation could be sued in the original action as "relief defendants." JRG Fox Valley, 976 F. Supp. at 1164. The JRG Fox Valley court did not, however, examine the language of 735 ILCS 5/2-1402(a) itself. Instead, the court relied on a Seventh Circuit decision, Wilson v. City of Chicago, 120 F.3d 681 (7th Cir. 1997). Wilson, in turn, did not implicate 735 ILCS 5/2-1402(a) but rather involved 745 ILCS 10/9-102, which deals with the liability of a local government entity to pay a tort judgment or settlement entered against an employee who was acting within the scope of her employment. The Seventh Circuit also relied on 28 U.S.C. § 1367(a),[5] the statute conferring supplemental jurisdiction on federal courts as ancillary jurisdiction. The JRG Fox Valley case is does not control in the instant proceeding, because neither 745 ILCS 10/9-102 nor 28 U.S.C. § 1367(a) is applicable. Moreover, Illinois law, not federal law, controls the resolution of the

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[5] 28 U.S.C. §1367(a) provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

matter. Fed. R. Bankr. P. 7069. See also Cortez v. Defendant Deputy Sheriffs, 1999 WL 569542 (N.D. IL 1999).

This Court finds that the Complaint against STI must be dismissed. Without a judgment against LLC, the Trustee's complaint against STI fails because it has not been established that STI is liable to either the debtor or the debtor's successor in interest, the Trustee. No judgment

has been entered against LLC in this proceeding. In fact, even if a judgment had been entered against LLC, STI liability to the Trustee does not necessarily follow. Instead, the Trustee must identify property of the debtor held by STI and the value of such property. See 11 U.S.C. §542. See also Lange v. Misch, 598 N.E.2d 412, 415 (IL App. Ct. 1992). In effect, the Trustee must generally identify a debt that STI owes to the debtor, and take steps to recover that asset for the estate. This may require the Trustee to pursue an action against STI in the nature of a supplementary proceeding or, under Illinois law, a citation hearing under 735 ILCS 5/2-1402.

LLC also contends that the Complaint against it should be dismissed for failure to state a claim upon which relief can be granted because the Trustee fails to seek restitution of a benefit conferred upon LLC. See Fed. R. Civ. P. 12(b)(6). LLC argues that Illinois does not recognize a claim for the aiding and abetting a breach of fiduciary duty. LLC is correct. See Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449,452 (7th Cir. 1982)(holding that there is no such tort), Koutsoubos v. Casanave, 816 F.Supp. 472, 475 (N.D. IL 1993)(stating that Illinois has never recognized a tort for aiding and abetting a breach of fiduciary duty).

However, as the parties appear to agree, there is a cause of action under Illinois law for knowingly participating in or intentionally inducing a breach of fiduciary duty. See Sain v. Nagel, 997 F. Supp. 1002, 1018 (N.D. IL 1998). "A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary." Corroon & Black of Illinois v. Magner, 494 N.E.2d 785, 790 (IL App. Ct. 1986)(citing Chicago Park District v. Kenroy, Inc., 402 N.E.2d 181, 186 (IL 1980)). Thus, a third party who knowingly participates in or induces a breach of duty by an agent is liable to the person to whom the duty is owed, provided that the third party obtained a benefit

from the breach. Sain, 997 F. Supp. at 1018. There is, as one court has pointed out, a "material difference between the obligation of restitution of benefits a party gains through collusion in a fiduciary's breach of trust, for which a cause of action does exist, and aiding and abetting the breach of a fiduciary duty, for which one does not exist." Emjayco v. Morgan Stanley & Co., Inc., 1996 WL 452266 at *6 (S.D.N.Y. 1996).

The parties disagree as to whether the benefits derived from the continued operation of business in serious financial trouble are sufficient to justify the imposition of liability under a theory of knowingly participating in or inducing a breach of fiduciary duty. The Trustee cites Salem Mills, Inc. v. Wisconsin Tool and Stamping Co. (In re Salem Mills, Inc.), 881 F.Supp. 1109 (N.D. IL 1995) and Jason Winter's Herbaltea (Bahamas) Ltd. v. Flemming Imports Corp., 494 F.Supp. 828 (N.D. IL 1980), in support of his argument that the continuation of a business relationship is a sufficient benefit.

In the Salem Mills case, the owners and principal officers of Salem Mills negotiated a contract with the president of Wisconsin Tool and Stamping Company, and Wisconsin Tool began to purchase metals from Salem Mills in 1988. During 1989, the owners and principal officers of Salem Mills began to make payments to an officer of Wisconsin Tool. The purpose of the payments was to induce Wisconsin Tool to continue to buy metals from Salem Mills. Those in charge of Wisconsin Steel knew nothing of the kickback payments. In 1990, the president of Wisconsin Tool learned of the payments, and an officer who received the kickbacks was fired. Wisconsin Tool filed a lawsuit against those owners and principal officers of Salem Mills who had made the secret kickback payments to the disloyal Wisconsin Tool officer. Wisconsin Tool moved for summary judgment on, inter alia, the count of its complaint for

inducement of breach of fiduciary duty. The court found that when the Wisconsin Tool officer accepted the illegal kickback payments from Salem Mills' officers, he breached his fiduciary duty to Wisconsin Tool because Wisconsin Tool prohibited its employees from accepting gifts from suppliers. The court found that the Salem Mills' officers knowingly induced this breach of fiduciary duty because they knew that the bribes would ensure that Mills would continue to be a supplier for Wisconsin Tool. By bribing the Wisconsin Tool people, Salem Mills was able to continue a profitable relationship with Wisconsin Tool. Id. at 1117. Thus, the court found that Salem Mills received a benefit from Wisconsin Tool's employees' acceptance of bribes from Wisconsin Tool – the continuation of a lucrative supply contract, and thus was liable for inducement of breach of fiduciary duty and entered summary judgment against them. Id. at 1117.

Thus, the Complaint states a cause of action upon which relief can be granted. Applying the Salem Mills analysis to the instant proceeding, it is clear that Mouton, as the Debtor's sole and chief officer had a fiduciary relationship with LLC. He breached his fiduciary duties when he took the checks belonging to LLC. The Trustee has alleged that LLC knowingly participated in Mouton's breach of fiduciary duty to the Debtor. The Trustee has also alleged that LLC obtained a benefit, the strengthening of a business relationship, from the participation in the breach of fiduciary duty. This is sufficient to state a cause of action for inducement of breach of fiduciary duty because, in the context of a motion to dismiss, the Trustee need not prove that he will ultimately prevail on his claim, but rather need only establish that there is a set of facts under which the Trustee may be entitled to relief. Moreover, all inferences that can be drawn from the facts alleged by the Trustee must be considered in a light favorable to the Trustee. See

Autry v. Northwest Premium Services, Inc., 144 F.3d 1037, 1039 (7th Cir. 1998). Based on the facts alleged by the Trustee, and the inferences to be drawn therefrom, the Trustee's Complaint states a cause of action against LLC.

Conclusion

For the reasons stated, the Defendants' motion to dismiss the first amended complaint against STI for failure to state a claim is granted. The Defendants' motion to dismiss the first amended complaint against LLC for failure to state a claim is denied.

Leave is given LLC to answer or otherwise plead to the first amended complaint on or before January 31, 2001. The first amended complaint is set for a status hearing with respect to the remaining defendants on February 7, 2001 at 10:00 a.m.

ENTERED:

Dated: January 17, 2001

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Robert E. Ginsberg
United States Bankruptcy Judge